No. 303. 04

Reply Brf. of McIntosh for D.

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JAMES H. McKENNEY
Clerk

IN THE

Supreme Court of the United States,

Filed April 20, 1900.

OCTOBER TERM, 1899.

No. 303.

THE SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE POSTAL TELEGRAPH-CABLE COMPANY,
DEFENDANT IN ERROR.

In Error to the United States Circuit Court of Appeals for the Fourth Circuit.

Brief for the Defendant in Error in Reply to Brief of the Counsel for the Plaintiff in Error.

J. R. McINTOSH,
Counsel for Defendant in Error.

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Brief for the Defendant in Error in Reply to Brief of the Counsel for the Plaintiff in Error.

The motion by defendant was to dismiss the writ of error from this court to the Circuit Court of Appeals, or to vacate the supersedeas thereon. The order made by the court was:

"It is now here ordered by the Court that the motion to dismiss be, and the same is, hereby denied, and that the supersedeas on the writ of error from this Court be, and the same is, hereby vacated."

Because of that order denying the motion to dismiss the writ of error, the learned counsel for the plaintiff assume the action of the court to be a final adjudication; that the order of October 24th, 1899, was a final order, and therefore, again in their last brief filed in this cause, reiterate arguments heretofore made by them upon the merits of the case.

I do not consider the refusal of the court to grant the motion to dismiss the writ of error as a final adjudication, holding that the order of October 24, 1898, or any other made by Judge Simonton in this cause was a *final order*, for the reason that none of them were *final orders*, and I take it that this court by its actions merely suspended its judgment upon the motion to dismiss at that time, and sustained the alternative motion to vacate the supersedeas.

I will not treat the case now upon the same line of counsel for plaintiff, for the reason that I feel confident that this court will not hold that the order appealed from was a *final order*, and it not being a *final order*, of course this court has no jurisdiction of the appeal, and that the judgment of the Circuit Court of Appeals sustaining the motion to dismiss the writ of error will, when the matter comes up for proper consideration, be sustained.

For that reason I will decline to take the time of the court in making an argument upon the merits of this case, but will simply refer the court to my brief filed in this cause in reply to the brief of counsel for plaintiff in error last October, and also to my brief upon motion to dismiss appeal and *on the merits*, previously filed in the cause, where I quote the proposition:

"If it is apparent on the record that the appellate court has no jurisdiction on appeal, it will dismiss it without any motion

for that purpose, even if both parties oppose it." Citing *Bruner* v. *United States*, 11 How., 163; *Sampson* v. *Walsh*, 24 How., 207; *Merriman* v. *Petty*, 16 Wall., 338; *Burnham* v. *First National Bank*, 10 U. S. App., 485; *Latham's App.*, 9 Wall., 185; and specially to the opinion in the case of *Luxton* v. *North River Bridge Co.*, 147 U. S., 337–341.

In support of the proposition that the order appealed from, by the writ of error, was not a *final order*, I deem it unnecessary to quote any authorities in addition to those cited in the two briefs heretofore filed by me in this cause; and, it not being a final order, this court will, of course, dismiss it, even though the motion in the cause may be informal.

Respectfully submitted,

J. R. McINTOSH,
Counsel for Defendant in Error.